Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JAMES IHNEN AND LISA IHNEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is summary judgment properly granted in favor of the United States on its equitable estoppel defense, dismissing Taxpayers' suit for refund of federal income taxes erroneously assessed and paid following an audit, where Taxpayers and the Internal Revenue Service executed a nonbinding settlement agreement following the audit and, prior to commencement of the suit for refund, the statute of limitations on any claim by the United States against taxpayers for additional tax due in the relevant tax years had expired, where the United States did not assert any claim for additional taxes allegedly due in those years, the taxpayer never asserted the statute of limitations, the Government did not show any of the traditional elements of equitable estoppel, and the claim for refund, which was timely and authorized by statute, was precipitated by an audit of subsequent tax years, wherein the Internal Revenue Service's audit procedures in both audits were discovered to be so arbitrary that the first assessment was clearly erroneous, such that the Government had been unjustly enriched?

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PETITION FOR A WRIT OF CERTIORARI TO
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James Ihnen and Lisa Ihnen, Petitioners, by the undersigned counsel, under the appropriate rules of this Court, hereby request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 272 F.3d 577 (8th Cir. 2001), and is reproduced in App. A at 1a-7a. The opinion and order of the United States District Court for the District of South Dakota is unreported and is reproduced in App. B at 8a-16a. The order of the Court of Appeals denying the petition for rehearing en banc is unreported and is reproduced in App. C at 17a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on November 27, 2001. A timely Petition for Rehearing En Banc was denied on March 19, 2002. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

U.S. Const. Art. 1, §1 provides, in relevant part: "All legislative powers herein granted shall be vested in a Congress of the United States ... ."

26 U.S.C. §7121 provides, in relevant part:

> "The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person ... in respect of any internal revenue tax for any taxable period. ... If such agreement is approved by the Secretary ... such agreement shall be final and conclusive ... ."

26 U.S.C. §7122 provides, in relevant part:

> "The Secretary may compromise any civil or criminal case arising under the internal revenue laws. ... Whenever a compromise is made by the Secretary in any case, there shall be placed on file in the office of the Secretary the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor with a statement of – (1) the amount of tax assessed, (2) the amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and (3) the amount actually paid in accordance with the terms of the compromise. ... No such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to tax, or assessable penalty) is less than $50,000. ..."

26 U.S.C. §6501 provides, in relevant part: "any tax imposed by this title shall be assessed within three years after the return was filed ... and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period."

26 U.S.C. §6511 provides, in relevant part:

> "Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later...."

26 U.S.C. §6532 provides, in relevant part: "No suit or proceeding under Section 7422(a) for recovery of any internal revenue tax, penalty or other sum, shall be begun ... after the expiration of 2 years from the date of mailing ... of a notice of the disallowance...."

26 U.S.C. §7422 provides, in relevant part: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary...."

Fed.R.Civ.P. 56(c) provides, in relevant part:

> "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Fed.R.Civ.P. 13(a) provides, in relevant part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. ..."

Fed.R.Civ.P. 8(c) provides, in relevant part: "In pleading to a preceding pleading, a party shall set forth affirmatively ... statute of limitations ... and any other matter constituting an avoidance or affirmative defense."

STATEMENT OF THE CASE

James and Lisa Ihnen ("Taxpayers" or "Ihnens") brought this suit, pursuant to 28 U.S.C. §1346(a)(1), in the United States District Court for the District of South Dakota, seeking a refund of federal income taxes, self-employment taxes, interest and penalties illegally assessed and collected, for the calendar years 1986 through 1991 totaling $218,950.10, plus interest and costs allowable by law. The United States ("Government") answered asserting affirmative defenses including that of equitable estoppel based upon the execution by Taxpayers' prior counsel of a Form 870-AD settlement agreement. The United States moved for summary judgment on the basis of this affirmative defense. The District Court granted the Government's Motion for Summary Judgment and Taxpayers' Complaint was dismissed with prejudice. The United States Court of Appeals for the Eighth Circuit affirmed and rehearing en banc was denied. This Petition followed.

Ihnens sought Claims for Refund with the District Director of the Internal Revenue Service at St. Paul, Minnesota, which claims were disallowed on October 15, 1998 and March 12, 1999. This action was commenced on July 20, 1999.

Ihnens were represented by Russell Kading, Attorney at Law, with respect to their federal income tax liabilities for

the tax years 1986 through 1991. The Internal Revenue Service (IRS) audited Ihnens' joint federal income tax return for those years. In connection with that audit, the IRS concluded that Ihnens had under-reported self-employment income from the restaurant which they owned and operated, known as the Tea Steakhouse, during those years.

On July 25, 1995, Mr. Kading executed an Internal Revenue Service Form 870-AD which was accepted on behalf of the Commissioner of the Internal Revenue by L. A. Kemp, Associate Chief of Appeals, on August 3, 1995. Therein Taxpayers consented to the assessment and collection of alleged deficiencies and additions to tax which are the subject of this claim for refund. The document indicated tax deficiencies of $148,288 plus $36,377 in penalties, and recited that "no claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributable to carrybacks provided by law." The Government conceded alleged tax deficiencies of $52,707.

Ihnens consented to the assessment as set forth in the Form 870-AD under duress, due to threats of criminal prosecution. The Ihnens never believed that the original returns as filed in calendar years 1986 through 1991 understated their income. Mr. Kading, as a condition of the execution of the Form 870-AD, specifically reserved in writing the right to proceed further before the Internal Revenue Service to determine Plaintiffs' actual tax deficiency, if any, in a letter which he wrote on July 13 1995 to Mr. Steven P. Onken, an Appeals Officer with the Internal Revenue Service, which stated as follows:

> Please be advised that I did meet with my clients on July 12, 1995, in regard to the above-referenced matter. I did call your office after I had my meeting with my clients but was advised that you were not available at the time of my phone call.

> I did review the content of your letter to me of June 2, 1995, together with the enclosures contained therein, with my clients, a copy of that letter and the enclosure being enclosed herein. My clients, in an effort to avoid further legal fees and related matters, have agreed to making the content of your letter a formal offer for settlement.
>
> I would therefore appreciate hearing from you in regard to this matter as soon as possible. This agreement is made with the specific understanding that this is no way prevents or precludes my clients for making an offer in compromise to the Internal Revenue Service of whatever the actual tax liability in this matter computes out to be. I thank you very much for your cooperation and assistance in this matter.

(Emphasis in original). Following unsuccessful attempts to renegotiate the assessment, Ihnens paid the amounts specified in the Form 870-AD on January 31, 1997.

Beginning in October of 1997, Ihnens were audited for tax years 1994 and 1995. The Internal Revenue Service again used the percentage computation method to reach an initial determination that Taxpayers' income as reported in 1994 was understated by $786,056.45. However, after discrepancies in the audit methodology were pointed out to the Internal Revenue Service by Taxpayers' new counsel, their 1994 and 1995 returns were accepted as filed and the audits were concluded. This raised grounds to re-evaluate the deficiencies assessed for 1986-91. Consequently, Taxpayers' expert, Douglas Uthe, CPA, reviewed the 1987 through 1991 audits to determine whether the Internal Revenue Service had made the same errors therein. Mr. Uthe's analysis, based almost exclusively on data gleaned from the Internal Revenue Service Auditor's own work papers, demonstrated

that the Internal Revenue Service alleged tax deficiency for calendar years 1987 through 1991 was substantially overstated, by "at least $165,358," and based upon arbitrary procedures. Thus, this claim for refund was commenced in September of 1998 and, upon denial, suit was filed in July of 1999.

REASONS FOR GRANTING THE WRIT

Come now Petitioners James Ihnen and Lisa Ihnen and, pursuant to Supreme Court Rules 10(a) and (c), respectfully petition this Court for issuance of a Writ of Certiorari in this matter to the United States Court of Appeals for the Eighth Circuit, upon the following grounds:

(A) the Court of Appeals' decision in this matter filed November 27, 2001, conflicts with a decision of the United State Supreme Court – to-wit, *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929); and

(B) this proceeding involves questions of exceptional importance as follows:

(1) The Eighth Circuit's decision in this matter is in conflict with the authoritative decisions of other United States Courts of Appeals that have addressed the issues raised therein; e.g.: *Joyce v. Gentsch*, 141 F.2d 891 (6th Cir. 1944); *Bank of New York v. United States*, 170 F.2d 20 (3rd Cir. 1948); *Bennett v. United States*, 231 F.2d 465 (7th Cir. 1956); *Uinta Livestock Corp. v. United States*, 355 F.2d 761 (10th Cir. 1966); *Lignos v. United States*, 439 F.2d 1365 (2nd Cir. 1971); *Kretchmar v. United States*, 9 Cl.Ct. 191, 1985 U.S. Cl.Ct. Lexus 878 (1985); *Whitney v. United States*, 826 F.2d 896 (9th Cir. 1987); *See also Cain v. United States*, 255 F.2d 193 (8th Cir. 1958) (Van Oosterhout, J., dissenting).

(2) The Eighth Circuit's decision involved an issue of first impression in the federal court system which was decided by the Court of Appeals without citation to controlling authority. That issue is:

> Whether summary judgment can be granted on an estoppel theory upon the ground that the moving party's counterclaim would be barred by the applicable statute of limitations where the United States did not assert a counterclaim in its pleadings at the trial court level and, hence, the taxpayer did not assert the affirmative defense of the statute of limitations in a responsive pleading or otherwise.

Because an unpled statute of limitations is generally deemed to be waived – *See United States of America v. Big D Enterprises, Inc.*, 184 F.3d 924, 935 (8th Cir. 1999), the Court of Appeals' decision that summary judgment was properly granted based upon an estoppel theory arising from an unpled, and hence, non-existent or waived affirmative defense, is error.

(3) The Eighth Circuit's decision is contrary to the most fundamental principals of equity.

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH *BOTANY WORSTED MILLS V. UNITED STATES*, 278 U.S. 282 (1929).

Petitioners commenced this action in District Court on July 20, 1999, timely seeking recovery of federal income taxes, self-employment taxes, penalties and interest for the calendar years 1986 through 1991. The basis for this Complaint was that the Commissioner erroneously determined that Ihnens had unreported income. In answering, the United States alleged an affirmative defense that Ihnens were estopped from pursuing any refund because they had settled the tax liabilities with the Internal Revenue Service through the execution of a Form 870-AD, and that the statute of limitations had expired on any potential counterclaim for additional tax deficiencies. The United

States moved for summary judgment which Ihnens resisted. The District Court held that Ihnens were equitably estopped from bringing a refund claim which was inconsistent with the settlement agreement, even though the Taxpayers' counsel, Russell Kading, had contemporaneously reserved in writing the right to seek a refund or submit further offers in compromise, because the statute of limitations had expired on the Government's potential counterclaim, citing *Cain v. United States*, 255 F.2d 193 (8th Cir. 1958), and granted the motion. The Eighth Circuit affirmed. *Ihnen v. United States*, 272 F.3d 577 (8th Cir. 2001).

26 U.S.C. §7121 and §7122 provide the sole statutory methods by which a binding closing agreement or compromise can be executed between a taxpayer and the Secretary of the Treasury. *Botany Worsted Mills v. United States*, 278 U.S. 282, 73 L.Ed. 379 (1929). Each of those statutes requires that a closing agreement or compromise be authorized by the Secretary of the Treasury in writing. 26 U.S.C. §§7121, 7122. That was not done in this case. It is undisputed by the Government that no binding closing agreement or compromise was executed in this matter.

The *Botany Worsted Mills* case involved disputed taxable income for the tax year 1917. 278 U.S. at 284. In 1920, the Commissioner of Internal Revenue assessed additional income tax against Botany. *Id.* Botany paid the additional tax and petitioned the Court of Claims in 1924 to recover this sum from the United States, with interest. *Id.* at 284-285. The trial court denied the recovery upon the finding that the settlement agreement prevented recovery. *Id.* at 285. As in the case at bar, the Government acknowledged that there had not been a compromise under the controlling statute, but contended that, because of the settlement agreement, it had conceded "other disputed items the benefit of which [the taxpayer] still enjoyed." *Id.* at 286.

In *Botany Mills*, the Court of Claims, in sustaining the Government's contention, ruled that it was inequitable for

Botany Mills to recover on its petition "and at the same time hold to the advantage derived from the settlement of the other items in dispute involved in the same general settlement." *Id.* at 287. This clearly indicates that the statute of limitations had expired on the Government's ability to reassert those issues. Otherwise, Botany Mills would have been unable to "hold to the advantage derived from the settlement," because the settlement was not binding on either party.

As astutely noted by Justice Van Oosterhout's dissent in this Court's opinion in *Cain v. United States*, 255 F.2d 193 (8th Cir. 1958), although not expressly noted in the *Botany Mills* decision, the dates involved there would demonstrate that the statute of limitations had run against the Government in the *Botany Mills* case when the taxpayer instituted its petition to recover tax. 255 F.2d at 200. This is implied by the phrases noted above from the *Botany Mills* opinion indicating that the Government's claim of estoppel was predicated upon the fact that Botany Mills had accepted concessions from the government "of which it still enjoyed," 278 U.S. at 286, and an analysis of the relevant statutes.

As required by the Revenue Act of 1916, 39 Stat. 756, and the Revenue Act of 1917, 40 Stat. 300, Botany Worsted Mill filed its tax return for the taxable year ending November 30, 1917, *Botany Worsted Mills v. United States*, 63 Ct.Cl. 405 (1927). The return was due January 30, 1918. 39 Stat. Ch. 463 § 13. The statute of limitations for the Commissioner of the Internal Revenue to file an additional assessment was three years from the due date of the return. 39 Stat. Ch. 463 § 14. Botany Mills paid the United States the tax liability disclosed on the return on January 14, 1918. *Botany Worsted Mills v. United States*, 63 Ct.Cl. 405, *supra*. The Revenue Act of 1918 extended the statute of limitations for an assessment of additional tax. As amended, the Commissioner had five years from the date the return was made or was due to determine, assess and collect additional income tax. 40 Stat. Ch. 18 § 250. Initially, the statute of limitations ran against

the Commissioner on January 30, 1921. As modified by the Revenue Act of 1918 the statute of limitations ran against the Commissioner on January 30, 1923. The statute of limitations on assessment was further modified by the Revenue Act of 1921, 42 Stat. 227, to five years after the return was filed unless the taxpayer and the Commissioner consented in writing to a later assessment and collection date. 42 Stat. Ch. 136, § 750. The Commissioner was prohibited from collection by suit after the expiration of five years after the date the return was filed. *Id.*

On September 11, 1919, the Commissioner of the IRS disallowed a portion of the compensation deduction claimed by Botany Mills. *Botany Worsted Mills v. United States*, 63 Ct.Cl. 405, *supra*. On or about June 17, 1920, an additional assessment was made against Botany Mills and that sum was paid on or about June 28, 1920. *Id.* On February 1, 1922, Botany filed a claim for refund with the Commissioner of the Internal Revenue Service. *Id.* This claim was disallowed by the Commissioner on or about September 26, 1922. *Id.* On September 24, 1924 Botany Mills filed suit in the Court of Claims seeking to recover $450,994.06 of the June 1920 additional assessment. *Id.* On September 24, 1924 the statute of limitations, whether under the Revenue Act of 1916 or the provisions of the Revenue Act of 1918 or 1921, had run against the Commissioner to file suit or to make an additional assessment. Thus, as Judge Van Oosterhout correctly observed, the statute of limitations had run against the Government when Botany Mills instituted its refund suit.[1]

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[1] In 1916 the statute of limitations for recovery of an Internal Revenue Service tax erroneously assessed or collected was two years. All claims for refund of such a tax were required to be presented to the Commissioner of the Internal Revenue Service within two years of the date that the cause of action occurred. 1916 Revised Statutes Sec. 3228. The statute of limitations on a suit to recover tax erroneously or illegally assessed or collected was two years from the date that the cause of action accrued. 1916 Revised Statutes 3226 and 3227. In 1921, Revised Statutes Sec. 3228 was amended to provide that the statute of limitations for refund claims for taxes erroneously or illegally assessed was four years from the date of payment

Since the *Botany Mills* decision, the Internal Revenue Service has known, to an absolute certainty, that informal settlement agreements like those made under the Form 870-AD do "not constitute a settlement which in itself was binding upon the Government or the [taxpayer]." *Id.* at 289. And, despite the fact that in *Botany Mills* the taxpayer had delayed, for whatever reason, filing his petition in the Court of Claims until after the Government's ability to reassert the concessions it had made in the settlement had expired, the United States Supreme Court stated, in a unanimous decision, that "here the findings disclose no adequate ground for any claim of estoppel by the United States." *Id.* at 289. Indeed, the Supreme Court did not even decide whether estoppel could lie in *any case* involving an informal agreement between a taxpayer and the IRS. *Id.* It left this issue undecided. *Id.* Nevertheless, in the case at bar, the Court of Appeals' decision affirms summary judgment in favor of the United States, relying on *Cain*, solely on the ground that the statute of limitations had expired on the Government's potential counterclaim.

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of the tax. 42 Stat. Ch. 136, Sec. 1316. This provision was retroactive for a claim for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918. *Id.* In the same enactment, Sec. 3226 of the Revised Statutes was amended to provide that the statute of limitations for a suit for the recovery of an Internal Revenue Service tax erroneously or illegally assessed or collected was five years from the date of the payment of such tax. 42 Stat. Ch. 136, § 1318. This section did not affect any suit or proceeding instituted prior to the passage of the Act, but applied to all suits and proceedings instituted after the passage of the Act. *Id.* Botany Mills paid its additional assessment on or about June 17, 1920. As a result of the 1921 Revenue Act, Congress allowed Botany Mills to file a refund claim by June 17, 1924, and authorized a refund suit if filed by June 17, 1925, while at the same time the Commissioner was limited by the statute of limitations to assess within five years after the return was filed, January 30, 1923. Accordingly, Congress, in the 1921 Revenue Act, authorized a refund claim and a refund suit as timely when filed after the statute of limitations on assessment and collection had run against the Commissioner. The same holds true under current law. 26 U.S.C. §§ 6501, 6511, 6532, 7422.

The cornerstone of the *Botany Mills* decision is the fact that the statutory scheme created for compromise and settlement of tax claims cannot be altered administratively or judicially. This is an issue of separation of powers and must be addressed by the Congress. U.S. Const. Art. 1, §1. Under the *Botany Mills* analysis, in the case at bar, the statutory provisions for a binding settlement agreement have not been met, and no grounds for estoppel have been proven by the United States.

B.1. THE EIGHTH CIRCUIT'S DECISION, RELYING ON *CAIN*, IS IN CONFLICT WITH OTHER COURTS OF APPEALS THAT HAVE CONSIDERED SIMILAR CASES, AND CERTIORARI IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

In *Joyce v. Gentsch*, 141 F.2d 891 (6th Cir. 1944), the taxpayer executed an informal settlement agreement with the Internal Revenue Service and later filed a claim for refund predicated upon information gleaned by him after the settlement. The statute of limitations had run against the Commissioner for making additional assessments against the taxpayer at the time he filed his claim for refund; however, no evidence was produced at trial to suggest that any additional tax was owed. *Id.* at 894. The Circuit Court held that the waiver form in *Joyce* was not binding upon the Government and did not bind the taxpayer. *Id.* The Court found it salient that "the record discloses no evidence of misrepresentation upon which the Government relied, or any failure of the taxpayer to speak when he should have spoken, upon which the defense of estoppel can properly be grounded." *Id.* at 897.

Further, the Government in *Joyce* had shown no evidence that it would suffer actual damage; i.e., that it had any meritorious claim against the taxpayer for additional tax. *Id.* Thus, the essential elements for application of the

doctrine of equitable estoppel were lacking in the case, and the decision of the District Court was reversed and with a mandate that judgment be entered in favor of the appellant as prayed in his Complaint. *Id. See also Bank of New York v. United States*, 170 F.2d 20 (3rd Cir. 1948); *Bennett v. United States*, 231 F.2d 465 (7th Cir. 1956).

In *Uinta Livestock Corporation v. United States*, 355 F.2d 761 (10th Cir. 1966), the Government asserted its estoppel defense, claiming that it made several concessions of tax liability in order to secure the Form 870-AD agreement and allowed the statute of limitations to run against the individual shareholders of the taxpayer corporation. *Id.* at 765-66. The *Uinta* court indicated that, even if these factors were enough to invoke the defense of estoppel, in order to prevail, the Government must prove detrimental reliance, as well as false representation. *Id.* at 766-67. The *Uinta* court held that each particular case must be analyzed under the full rubric of "the ordinary rules of equitable estoppel." *Id.* at 767. Accordingly, the *Uinta* court noted:

> The Government has not pointed to any action of the taxpayer that was misleading and certainly we can find no false misrepresentation... . Furthermore, the facts do not indicate a strong case of reliance and detriment especially when the Commissioner should have been aware of the doubtful validity of the agreement which is neither a closing agreement or a compromise signed by the Secretary. ***By applying some kind of estoppel to a situation like this where the true elements of estoppel are not present, we would be breathing life into the Form 870-AD agreement where the Supreme Court said in the Botany case, supra, there should be none.***

Id. (Emphasis added). Consequently, the *Uinta* court

reviewed the merits of the refund claim in total and determined that judgment in favor of the taxpayer was appropriate. *Id.* at 769. *See also Lignos v. United States*, 439 F.2d 1365, 1368-69 (2nd Cir. 1971).

In *Whitney v. United States*, 826 F.2d 896 (9th Cir. 1987), the Court reviewed the caselaw existing at that time and stated that "the decisions turn on the intricacies of the facts involved." *Id.* at 898. The *Whitney* court concluded that the language in Form 870-AD is contradictory and should be construed against the drafter, because it purports to prevent the taxpayer from reopening a disputed tax case without being a settlement agreement under 26 U.S.C. §7121. *Id.* "Since it is not a valid compromise of a tax deficiency, standing alone it should not estop the executing taxpayer from seeking a refund." *Id.* Further, the *Whitney* court concluded that whether equitable estoppel should apply against a taxpayer involves questions of fact and credibility determinations which must be resolved. *Id.* Fact questions included the motivation and intent of the parties in settling the case on the basis set forth in the form, and what collateral representations were made. *Id.* Thus summary judgment was reversed. *Id.* at 899.

The *Cain* decision, which is 43 years old, and the Eighth Circuit's decision in the case at bar, should be repudiated in light of the subsequent and more precise interpretation of the *Botany Mills* case made by other circuits, and by a restatement of this Court's holding therein. It is clear that in *Botany Mills*, the United States Supreme Court intended that the mere passage of the Government's statute of limitations, standing alone, may not support the defense of equitable estoppel.[2]

B.2. SUMMARY JUDGMENT CANNOT BE

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[2] Court of Appeals for the Fifth Circuit has adopted an erroneous interpretation of *Botany Mills* similar to that employed in *Cain* and the case at bar. *See Daugette v. Patterson*, 250 F.2d 753 (5th Cir. 1957).

GRANTED ON AN ESTOPPEL THEORY BASED UPON A STATUTE OF LIMITATIONS WHICH WAS NEVER AFFIRMATIVELY PLED.

Under Federal Rule of Civil Procedure 8(c), the defense of the running of the applicable statute of limitations is an affirmative defense which must be set forth affirmatively in a pleading. The record discloses that the Taxpayers in this matter have never affirmatively pled the defense of statute of limitations.

"An affirmative defense which is neither pleaded as required by [R]ule 8(c) nor made the subject of an appropriate motion under Rule 12(b) is waived." *Systems, Incorporated v. Bridge Electronics Company, Inc.*, 335 F.2d 465, 466 (3rd Cir. 1964). "The Statute of Limitations is an affirmative or so-called 'personal privilege' defense which may be waived if not promptly pleaded." *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1155 (2nd Cir. 1968). "A defense based upon the statute of limitations is generally waived if not raised in a responsive pleading." *United States of America v. Big D. Enterprises, Inc.*, 184 F.3d 924, 935 (8th Cir. 1999).

The applicable statute of limitations in this matter is 26 U.S.C. §6501. That statute provides that "any tax imposed by this title shall be assessed within three years after the return was filed...and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." That this statute of limitations is subject to the same requirement of affirmative pleading under FRCP 8(c) has been long established. *United States of America v. Gurley*, 415 F.2d 144, 147 (5th Cir. 1969) ("[A]s a general rule of law, the running of the statute of limitations is an affirmative defense, to be pleaded and proved by the taxpayer."); *Badway v. United States of America*, 367 F.2d 22, 25 (1st Cir. 1966) ("Under Rule 8(c) of the Federal Rules of Civil Procedure, the statute of limitations and *res judicata*

are defenses which must be set forth affirmatively in the pleadings.") Thus, it is clear that "[t]he proposition that a statute of limitations is a defense in bar and not a plea to the jurisdiction would seem to require no citation." *United Business Corporation of America v. Commissioner of Internal Revenue*, 19 BTA 809, 831 (United States Board of Tax Appeals 1930).

The Government has, of its own choosing, failed to assert its compulsory counterclaim under FRCP 13(a) as to any alleged outstanding liabilities on the part of taxpayers. Rule 13 requires "[a] pleading [to] state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim... ."

Had the United States asserted a counterclaim, then the Plaintiffs would have had the option to either plead as an affirmative defense the statute of limitations under Rule 8(c), or to waive it. The Government did not assert its alleged counterclaim and the Taxpayers never asserted the statute of limitations thereon. As the statute of limitations has never been raised, it is nonsensical to suggest that Plaintiffs are estopped on that basis. At oral argument before the Court of Appeals, Taxpayers' counsel was asked, for the first time, if the statute of limitations would be waived on such counterclaim, to which counsel responded in the affirmative. Therefore, on remand, the Government can assert its counterclaim, and all of the issues relating to the Petitioners' true tax liability can be litigated upon the merits. In this event, both the Taxpayers and the Government will stand on equal footing, and there could be no basis for an equitable estoppel against the Taxpayers on any legal theory. Neither the United States, nor the District Court, allowed this to develop. Therefore, it is clear that the District Court's summary judgment in this matter was plain error. *See generally, Brown v. Fifth Judicial District Drug Task Force*, 255 F.3d 475 (8th Cir. 2000).

B.3. THE EIGHTH CIRCUIT'S DECISION IS CONTRARY TO THE MOST BASIC PRINCIPALS OF EQUITY.

Equitable estoppel is intended to prevent a party from taking unconscionable advantage of its wrong by asserting its strict legal rights. 28 Am.Jur.2d, *Estoppel and Waiver* §30 (2000).

> The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done. It is to be applied with the utmost caution and restraint; it should be carefully and sparingly applied. Equitable estoppel is not favored and will not be invoked lightly. Equitable estoppel should be applied only in very compelling circumstances where the interests of justice, morality and common fairness dictate that course. In determining the application of the doctrine, the counterequities of the parties are entitled to due consideration. It is available only in defense of a legal or equitable right or claim made in good faith and can never be asserted to uphold a crime, fraud, injustice, or wrong of any character. Estoppel is to be applied against wrongdoers, not against the victim of a wrong, although estoppel is never employed as a means of inflicting punishment or for an unlawful or wrongful act. It will be applied only upon clear and convincing evidence.

28 Am.Jur.2d, *Estoppel and Waiver* at §30. Typically, seven elements must be satisfied for the doctrine of equitable estoppel to apply. *Id.* at §40. Those elements include:

> (1) Conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey

> the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert.

Id. In the case at bar, there is no evidence to suggest that the Taxpayers intended to convey any misrepresentation or concealed any material facts or calculated to convey any impression contrary to their current position. At the time that the Kading letter was sent and the Form 870-AD was executed, the Taxpayers were being threatened with a criminal prosecution and their attorney had uncovered no evidence to assist them in defending the assessment. Upon a subsequent audit, where the Taxpayers had superior representation, and an expert was retained to evaluate the assertion of unreported income, evidence was gleaned from the IRS's own work papers showing that both the proposed assessment and the prior assessment were without merit. It was at that time and on that basis that the Taxpayers made the decision to commence a claim for refund. That basis is consistent with the Kading letter which reserved the right to make a subsequent offer in compromise "of whatever the actual tax liability in this matter computes out to be."

The second and third elements of estoppel are that the party to be estopped knew true facts which were contrary to the represented facts and intended the other party to act upon the untrue facts. *Id.* The record discloses that the Taxpayers herein were not made aware of the true facts relating to the 1986-1991 assessments until they were re-audited for tax years 1994 and 1995 for the same business, and analysis by new counsel and a retained expert showed that the IRS's audit procedures in both audits were flawed, and the 1994 and 1995 returns were accepted as filed.

The fourth element of estoppel is lack of knowledge or of the means of knowledge by the party seeking estoppel of the truth as to the facts in question. 28 Am.Jur.2d at §40. The net worth information which Taxpayers' expert witness, Douglas D. Uthe, utilized for his analysis showing the over-

assessments in 1987, 1988 and 1989, came "almost exclusively from data...gleaned from the Internal Revenue Service auditor's work papers." As noted by Mr. Uthe in his report, he was able to demonstrate that the Internal Revenue Service deficiency "was substantially overstated," and that there was "no evidence in the IRS report and supporting work papers that the Commissioner made any attempt to support the understatement of income determined by using the percentage of cost of goods sold method of computing income with an accounting of the possible disposition of the funds such as a net worth statement." In Mr. Uthe's opinion, "the Commissioner arbitrarily chose the method that produced the highest understatement of income." Mr. Uthe served as an Internal Revenue agent with the Internal Revenue Service for 26 years. Clearly, the Government should have known that its audit was overstated and possessed the information to ascertain this.

The fifth, sixth and seventh elements of estoppel are good faith reliance, change of position and resulting detriment to the party seeking estoppel. 28 Am.Jur.2d at §40. In this case there was no good faith reliance upon anything inconsistent with the Kading letter, which reserved Taxpayers' right to reopen this matter. The Internal Revenue Service knew full well that the Form 870-AD was non-binding. The Government can claim no detriment or prejudice because the alleged taxes and penalties which it claims to have waived were not owed in the first place. If they were, the Government could have and should have filed a counterclaim in this action, which it did not. As noted previously, the statute of limitations does not preclude the Government from asserting that counterclaim and if the taxpayer does not affirmatively assert the statute of limitations as a defense in bar, the counterclaim can be adjudicated upon the merits.

Thus, under traditional estoppel analysis, viewing the facts in the light most favorable to the Taxpayers, there is not a single element of estoppel that has been established in this

case, and no basis for summary judgment exists.

The Taxpayers' claim for refund is based upon new and competent evidence, which was discovered by them after the IRS re-audited them for subsequent tax years. Because the Taxpayers had superior counsel who retained a competent expert, it was determined both that the subsequent proposed assessment was without merit, and that the assessments which were previously levied under the Form 870-AD were unwarranted. Hence, the United States has been unjustly enriched at the expense of Taxpayers who were intimidated by a vastly overstated assessment predicated upon arbitrary methods. Equitable estoppel does not lie herein and the summary judgment should be reversed.

CONCLUSION

Wherefore, Petitioners James Ihnen and Lisa Ihnen respectfully request that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPECTFULLY SUBMITTED,
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No. 00-3799

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES IHNEN; LISA IHNEN,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

October 16, 2001, Submitted

November 27, 2001, Filed

DISPOSITION:
Affirmed.

COUNSEL:
For JAMES IHNEN, LISA IHNEN, Plaintiffs - Appellants: Douglas E. Hoffman, Sioux Falls, SD argued for Appellant.

For UNITED STATES OF AMERICA, Defendant - Appellee: Laurie A. Snyder, U.S. DEPARTMENT OF JUSTICE, Washington, DC argued for Appellee.

JUDGES:
Before BYE, BRIGHT, and RICHARD S. ARNOLD, Circuit Judges.

OPINION BY:
BRIGHT

OPINION:

BRIGHT, Circuit Judge.

In August 1995, appellants James and Lisa Ihnen reached an informal agreement with the Internal Revenue Service (IRS), resolving their federal income tax liabilities for the years 1986 to 1991. In September 1998, the Ihnens filed administrative refund claims for the taxes, penalties, and interest assessed under the agreement, alleging that the IRS had erroneously determined their tax liabilities for 1986-91. The Ihnens filed these claims more than three years after the agreement had been executed and after the statute of limitations had expired. Thus the IRS could not assert any claim for increased taxes and penalties which might have been owed absent a settlement. The IRS rejected the Ihnens' refund claims and the Ihnens brought suit for refund of allegedly overpaid taxes. The district court n1 granted the government's motion for summary judgment dismissing the claims, concluding that, under *Cain v. United States, 255 F.2d 193 (8th Cir. 1958)*, the Ihnens are now estopped from seeking a refund. We affirm.

I. Background

During the years in question, the Ihnens owned and operated the Tea Steakhouse, in Tea, South Dakota. The IRS audited the Ihnens' federal income tax returns and determined that the Ihnens had underreported their income for the years 1986-91. The IRS proposed assessing additional taxes in the amount of $ 200,995 for those years, along with penalties totaling $ 177,207. The Ihnens disputed the proposed assessments.

After receiving correspondence from an IRS Appeals Officer, Steven Onken, the Ihnens agreed to pay a reduced amount proposed for settlement by the IRS. The attorney for the Ihnens, Russell Kading, wrote to Onken on July 13, 1995, that the Ihnens agreed to the government's proposal and that "this agreement is made *with the specific understanding* that this in no way prevents or precludes my clients from making

an offer in compromise to the [IRS] of whatever the actual tax liability in this matter computes out to be." Jt. App. at 66 (emphasis in original).

Later that month the Ihnens executed, through Kading, a Form 870-AD settlement agreement. The form stated that the Ihnens "consented to the assessment and collection of the following deficiencies and additions to tax" for the years 1986-91: $ 148,288 in taxes and $ 36,377 in penalties. n2 The Ihnens agreed to pay these sums, along with fifty percent of the interest due on the taxes assessed for 1986 and 1987. They also agreed to neither file nor prosecute any "claim for refund or credit ... for the years stated on this form, other than for amounts attributed to carrybacks provided by law." The Commissioner agreed both to accept the tax liability as adjusted and not to reopen the case in the absence of fraud, malfeasance, misrepresentation, concealment, or important mathematical error. In the settlement the IRS waived fraud penalties and conceded a reduction of $ 52,707 in taxes. The Ihnens began to pay the government the money owed under the agreement.

The IRS subsequently audited the Ihnens' 1994 and 1995 tax returns and again proposed assessing additional taxes. The Ihnens, with different counsel, successfully challenged the assessments, and the IRS accepted their returns as filed. The Ihnens state that this successful challenge led them to seek a re-evaluation of the 1986-91 assessments on grounds that the IRS had used the same allegedly erroneous tax determination method for those years as it had for 1994-95. In September 1998, the Ihnens filed claims for refund of the taxes assessed under the 870-AD agreement. The IRS disallowed the refund claims.

The Ihnens timely filed a complaint in district court, seeking the claimed refunds. The government filed an answer. As a defense, the government asserted that the Ihnens were estopped from pursuing their refund claims by the 870-AD agreement because the statute of limitations had run against the IRS's ability to assess additional taxes and penalties relating to the years covered by the agreement.

The government moved for summary judgment on the basis of its estoppel defense. The district court granted the motion, concluding that Cain precluded the Ihnens from seeking a refund on taxes for which they had executed a settlement agreement and on which the statute of limitations had run against the IRS.

II. Discussion

We review grants of summary judgment de novo, applying the same standards as the district court. *Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997)*. "Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." *Clark v. Kellogg Co., 205 F.3d 1079, 1082 (8th Cir. 2000)*; see Fed. R. Civ. P. 56(c).

Informal administrative agreements such as the Form 870-AD presented here do not conclusively settle tax liability. See *Botany Worsted Mills v. United States, 278 U.S. 282, 288, 73 L. Ed. 379, 49 S. Ct. 129 (1929)* (holding that an informal agreement of settlement does not constitute a binding agreement); *Cain, 255 F.2d at 198* (noting that the statutes specifically authorizing and setting the procedure for the creation of binding agreements, of necessity, make informal settlement agreements nonbinding). However, where the statute of limitations has run on the IRS's ability to alter a taxpayer's liability for the years covered by an informal settlement agreement, the taxpayer may be estopped from seeking a refund of the taxes to which he or she agreed. The various circuit courts differ as to the circumstances under which the taxpayer is estopped. See, e.g., *Whitney v. United States, 826 F.2d 896, 897-98 (9th Cir. 1987)* (citing cases from seven circuits presenting "divergent views" on the extent to which Form 870-AD agreements estop taxpayers from later seeking a refund).

This circuit stated its position on the question in Cain, n3 where it "allowed the statute of limitations, on general legal

ground, to put a seal of finality on a tax settlement." *255 F.2d at 198.* The court went on:

We think it is sufficient to preclude a taxpayer from claiming refund, in relation to an executed settlement agreement, that the statute of limitations has run against the right of the Commissioner to deal with the situation further. n4

Id. at 199. It is undisputed that the Ihnens executed the settlement agreement and that they attempted to claim a refund after the statute of limitations had run against the Commissioner. Under Cain's clearly enunciated rule, there are no genuine issues of material fact and the government is entitled to summary judgment.

The Ihnens attempt to distinguish Cain **[*580]** on the facts. n5 They assert that the holding in Cain depended on the taxpayer in that case engaging in "tax gamesmanship," and observe that the underlying agreement in that case involved parties not represented in the lawsuit. It is true that Cain considered these matters relevant, but Cain also states that those facts only offer an alternative basis for its decision. *255 F.2d at 199.* ("We think that the grounds discussed, separately as well as collectively, required the summary judgment which the trial court entered.").

The Ihnens also note that the taxpayer in Cain made no attempt to preserve a right to reopen the matter. See *255 F.2d at 199* ("To have escaped [summary judgment], appellant at the least should have taken some step to repudiate the settlement agreement before the statute of limitations had run."). The Ihnens argue that Kading's letter to Onken specifically reserved the right to make a subsequent "offer in compromise ... of whatever the actual tax liability in this matter computes out to be." However, no such offer was made prior to the running of the statute of limitations.

At oral argument before this court, in a final effort to avoid the holding of Cain, counsel for the Ihnens waived the statute of limitations as a defense to any counterclaim the IRS might have for taxes it did not assess under the 870-AD

agreement. n6 The waiver, however, came too late. See *Renfro v. Swift Eckrich, Inc., 53 F.3d 1460, 1464 (8th Cir. 1995)* (stating that, absent exceptional circumstances, this court will not consider issues first raised on appeal). Moreover, whether the government could act on such a waiver is not at all clear. We do not rule on whether a waiver, timely made, would serve to defeat the government's estoppel argument. n7

In their reply brief to this court and again at oral argument, the Ihnens argued that the government effectively imposed the statute of limitations on itself, estopping itself from a counterclaim without ever asserting it. The Ihnens acknowledge that they might have dispelled the government's estoppel defense by waiving the statute of limitations on governmental assessment of taxes for the years covered by the 870-AD agreement, but maintain that they were never in procedural posture to do so. They are incorrect.

The government pleaded the estoppel defense in its answer to the complaint. Furthermore, the government, citing and quoting Cain, made the estoppel argument the sole basis of its motion for summary judgment. Those twin filings were sufficient to put the Ihnens on notice that the expiration of the statute of limitations formed the linchpin of the government's estoppel argument. The Ihnens had opportunity, particularly in their brief in opposition to summary judgment, to waive use of the statute of limitations and offer an argument to the district court that such waiver distinguished their situation from Cain. They did not avail themselves of that opportunity.

Accordingly, we affirm the summary judgment dismissing the refund claims of the Ihnens.

----------Footnotes----------

n1 The Honorable Lawrence L. Piersol, Chief Judge, United States District Court for the District of South Dakota.

n2 The Ihnens allege and state by affidavit that they did not believe their original tax returns for 1986-91 understated their income, and that they agreed to the assessment contained in the Form 870-AD agreement because they were advised by counsel that failure to accept the settlement would lead to criminal prosecution and incarceration.

n3 Judge Van Oosterhout wrote a strong dissenting opinion in *Cain. 255 F.2d at 199-202.*

n4 Cain explicitly differentiates this holding from "conventional equitable estoppel." *255 F.2d at 199.*

n5 The Ihnens also argue that Cain should be re-evaluated in light of more recent decisions by other circuits. We however are bound by the Cain opinion. See *LePique v. Hove, 217 F.3d 1012, 1014 (8th Cir. 2000).*

n6 After an initial discussion on the subject of waiver, during which counsel for the Ihnens appeared to waive the statute of limitations defense to a counterclaim by the government, a judge on the panel sought a clarification and asked: "I'm asking you again: Do you waive the statute of limitations?" Counsel replied, "Your Honor, we would waive the statute of limitations."

n7 We note that counsel for the government opined, at oral argument before this court, that the limitation on the government to assess taxes once the time for doing so had passed under *26 U.S.C. § 6501*, was a failure of power, not merely a limitation that could be waived by the other party. Cf. *Cain, 255 F.2d at 198-99* ("It may collaterally be noted that the limitations against the Commissioner as to making assessments, different than as to statute of limitations in general, have been held to go to the existence of the power and not to the matter of using a remedy.") (citing *Beverly Wall Paper v. Commissioner, 98 F.2d 211, 212 (3rd Cir. 1938)).*

CIV. 99-4139

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

JAMES IHNEN and LISA IHNEN,
Plaintiffs,

vs

UNITED STATES OF AMERICA,
Defendant.

September 12, 2000, Decided

September 12, 2000, Filed

COUNSEL:
For JAMES IHNEN, LISA IHNEN, plaintiffs: Michael Mitchell Billion, Myers, Peters, Hoffman & Billion, Sioux Falls, SD.

For UNITED STATES OF AMERICA, defendant: Bonnie P. Ulrich, U.S. Attorney's Office, Sioux Falls, SD.

For UNITED STATES OF AMERICA, defendant: Daniel R. Conrad, Donald N. Dowie, U.S. Department of Justice, Special Litigation, Washington, DC.

JUDGES:
Lawrence L. Piersol, Chief Judge.

OPINION BY:
Lawrence L. Piersol

OPINION:

MEMORANDUM OPINION AND ORDER

Defendant, United States of America, has filed a Motion for Summary Judgment, requesting that Plaintiffs' claims be dismissed with prejudice. Plaintiffs oppose the motion. For the reasons stated below, the government's motion for summary judgment is granted.

BACKGROUND

The following facts are undisputed unless noted.

James and Lisa Ihnen have owned and operated the Tea Steak House in Tea, South Dakota since 1987. The Ihnens reported income from the Tea Steak House on their federal income tax returns for the years 1986-91. The Internal Revenue Service ("IRS") audited those returns. (Government's Statement of Material Facts in Support of Motion for Summary Judgement ("Gov. Facts") P 1; Pl. Mem. at 1.) As a result of the audit, the IRS determined that Plaintiffs had underreported substantial amounts of income for those years. (Gov. Facts P 2; Gov. Mem. at 2.) Plaintiffs admit that the IRS made this determination but claim that the IRS's determination was erroneous. (Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Memorandum Opposing Summary Judgment ("Pl. Facts") P 1; Pl. Mem. at 1.) The parties do not appear to dispute, however, that the IRS proposed assessing additional income taxes, penalties and interests against Plaintiffs for the audited years, 1986-91. (Gov. Facts P 2; Pl. Facts P 1; Pl. Mem. at 1.)

As noted, at the time of the audits, Plaintiffs disputed the IRS's determination of their tax liabilities and retained an attorney, Russell Kading, to represent them. (Gov. Facts P 3; Pl. Mem. at 2.) In order to empower Mr. Kading to represent them before the IRS, Plaintiffs executed Power of Attorney and Declaration of Representative Forms 2848. (Gov. Facts P 4, Exs. B, C, & D.) On July 25, 1995, Mr. Kading, on Plaintiffs behalf, settled with the IRS on Plaintiffs' tax liability for 1986-91 by signing a Form 870-AD. (Gov. Facts P 5; Pl. Mem. at 2.) The Commissioner accepted the settlement in August 1995. In that settlement agreement, the Ihnens consented to the following assessments and penalties:

Year Ended	Income Tax	Penalty IRC § 6653(a)(1) (A)	Penalty IRC § 6653(a)(1) (B)	Penalty IRC § 6653(a)	Penalty IRC § 6661(a)	Penalty IRC § 6662
1986	$ 3,218	$ 161	–	–	–	–
1987	$ 40,096	$ 2,005	–	–	$ 10,024	–
1988	$ 31,915	–	–	$ 1,596	$ 7,979	–
1989	$ 32,953	–	–	–	–	$ 6,591
1990	$ 18,812	–	–	–	–	$ 3,762
1991	$ 21,294	–	–	–	–	$ 4,259

In addition, under the agreement the Ihnens were assessed 50 percent of the interest due on the $ 3,218 assessed for 1986 and 50 percent of the interest due on the $ 40,096 assessed for 1987. The government claims that in return, the IRS did not assess fraud penalties it had originally considered assessing and further, conceded $ 52,707 in income tax. (Gov. Facts P 9.) Plaintiffs dispute that the IRS conceded anything because they claim the IRS audit produced an erroneous, overstated assessment to begin with. (Pl. Facts P 2.)

Form 870-AD states that if the offer of settlement is accepted by the Commissioner of the IRS,

the case will not be reopened by the Commissioner unless there was:

* fraud, malfeasance, concealment or misrepresentation of a material fact

* an important mistake in mathematical calculation
* a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level
* an excessive tentative allowance of a carryback provided by the law

(Gov. Facts P 10, Ex. E at 2.) In addition, Form 870-AD also states that "No claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributed to carrybacks provided by law." (Id.)

According to Plaintiffs, Mr. Kading wrote to Stephen P. Onken on July 13, 1995 to accept the IRS's proposed settlement of the case. n1 (Pl. Mem. at 2; Pl. Facts Ex. A.) In that letter Mr. Kading stated that "this agreement is made with the specific understanding that this in no way prevents or precludes **[*5]** my clients from making an offer in compromise to the Internal Revenue Service of whatever the actual tax liability in this matter computes out to be." (Emphasis in original.) The government objects to this evidence on the ground that it is inadmissible hearsay.

Plaintiffs make other claims that the government neither admits nor denies. For example, Plaintiffs claim that the matter was referred to the Criminal Investigation Division of the IRS and that it was fear of criminal prosecution that lead them to consent to the settlement. (Pl. Mem. at 1; Pl. Facts P 3.) Plaintiffs also claim that they were audited for tax years 1994 and 1995. (Pl. Mem. at 2.) According to Plaintiffs, the IRS used the same faulty method to determine Plaintiffs' tax liability during the audit of years 1994-95 as the IRS had during the audits of years 1986-91. (Id.) During the 1994-95 audit, however, Plaintiffs claim that they were able to demonstrate to the IRS that its conclusions were in error and that the IRS subsequently accepted the Plaintiffs 1994 and 1995 returns as filed. (Id.)

Plaintiffs also put forth certain evidence from their retained expert, Mr. Doug Uthe. In Mr. Uthe's opinion, the IRS's assessment of Plaintiffs' tax liability for 1987 through 1991 is "vastly overstated." (Pl. Mem. at 2-3.)

Plaintiffs filed administrative refund claims with the IRS for the years 1986-1991 on September 24, 1998. (Gov. Facts P 13.) Prior to that time, the statute of limitations had run on the IRS's time to assess additional federal income taxes or penalties for those years. (Id. P 12.)

DISCUSSION

A. Standard of Review.

Under Rule 56(c) of the Federal Rules of Civil Procedure, "summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." *Clark v. Kellogg Co., 205 F.3d 1079, 1082 (8th Cir. 2000).* Once the moving party has met its burden, the non-moving party may not rest on the allegations of its pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exits. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986); City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 273-73 (8th Cir. 1988).*

B. Enforceability of Settlement Agreement in Form 870-AD.

The Internal Revenue Code provides two different ways to procure an administrative settlement of tax liability: through "closing agreements" in *26 U.S.C. § 7121* and "compromises" in *26 U.S.C. § 7122.* See *General Split Corp. v. United States, 500 F.2d 998, 1000-01 (7th Cir. 1974).* Because these two options are administratively onerous, the IRS has developed a practice of settling cases through non-statutory settlement agreements such as Form 870-AD. Id.; see also *Largen v. United States, 1995 U.S. Dist. LEXIS 10507, No.*

93-333, 1995 WL 556621 at *6 (M.D. Fla. July 14, 1995). The Supreme Court decided long ago that non-statutory settlements were not binding in and of themselves. See *Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379 (1929)*. The government concedes that a settlement agreement embodied in Form 870-AD is not a statutorily binding agreement and therefore, does not prevent the taxpayer from seeking a refund under all circumstances.

However, even though Form 870-AD is not statutorily binding, a taxpayer may be equitably estopped from bringing a refund claim in violation of such a non-statutory settlement agreement. Quoting from other courts, the Eighth Circuit has noted that "it would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed.'" *Cain v. United States, 255 F.2d 193, 198 (8th Cir. 1958)* quoting *Guggenheim v. United States, 111 Ct. Cl. 165, 77 F. Supp. 186, 196 (Ct. Cl. 1948)*; see also *General Split, 500 F.2d at 1003-4*. Thus, the Eighth Circuit found that "it is sufficient to preclude a taxpayer from claiming refund, in relation to an executed settlement agreement, that the statute of limitations has run against the right of the Commissioner to deal with the situation further." *Cain, 255 F.2d at 199*. Thus, to be estopped from bringing a refund claim in the Eighth Circuit, the moving party must show that a settlement agreement was executed by the taxpayer and that the statute of limitations has run against the IRS for the years encompassed in the settlement agreement. Id.

The government has met its burden. It is undisputed that Plaintiffs and the government executed a settlement agreement in Form 870-AD. In that settlement agreement the government promised not to reopen the case with limited exceptions and Plaintiffs promised not to seek a refund. Further, Plaintiffs do not dispute that their attorney Mr. Kading, who executed the form, was acting on their behalf and had authority to do so. It is also undisputed that the statute of limitations has run against the government on their

ability to assess taxes for 1986-91. Therefore, under the Eighth Circuit standard, Plaintiffs should be estopped from bringing this suit.

Plaintiffs claim that a more formal standard of estoppel used in other circuits should apply. See *Lignos v. United States, 439 F.2d 1365, 1368 (2d Cir. 1971)*; see also *Stair v. United States, 516 F.2d 560, 564 (2d Cir. 1975)*; *Elbo Coals, Inc. v. United States, 763 F.2d 818 (6th Cir. 1985)* (following Stair); *Whitney v. United States, 826 F.2d 896, 898 n.5 (9th Cir. 1987)*. However, the Eighth Circuit's standard in Cain remains good law and Plaintiffs have not shown any good reason why it should not apply. Further, the Eighth Circuit standard does not stand alone as the Seventh Circuit in General Split, the Sixth Circuit in Elbo and the Court of Claims in Guggenheim are often cited by other courts as standing for a similar proposition.

C. Additional Arguments

Plaintiffs also argue the merits of their case to some extent, claiming that their expert Mr. Uthe has conclusively shown that the IRS's method of calculation was erroneous. However, whether or not the IRS used the proper method of calculation is precisely the issue that should have been litigated at the time of the settlement. It is likely that if the IRS's method of calculation had been confirmed by a court to be the proper method, the IRS might not have conceded the $ 50,000 in tax liability or the other penalties owed by the Plaintiffs. Now that the statute of limitations have run, the IRS cannot assess those liabilities and penalties even if the IRS's method of calculation were found to be correct in a court of law. This is precisely the injustice sought to be avoided by the theory of estoppel.

Plaintiffs also state that their decision to settle was based in part on their fear of criminal prosecution. This is not an excuse. Plaintiffs were free to litigate the case before they signed the Form 870-AD. "All parties to potential litigation, when offered a settlement, must weigh the odds of prevailing upon a claim and potential gains against possible liabilities.

The choice is never easy, but it is not unfair or inequitable." *Largen, 1995 WL 556621* at *10.

CONCLUSION

Plaintiffs might have been able to litigate their claims even after signing the Form 870-AD if the claims had been brought before the statute of limitations ran against the government. See *Cain, 255 F.2d at 199* ("appellant at the least should have taken some steps to repudiate the settlement agreement before the statute of limitations had run against the Government"). The Court is aware that Mr. Kading died sometime after executing the Form 870-AD settlement agreement, but this fact does not change the Court's analysis. The statute of limitations has run, placing the government on unequal footing, and therefore, under the Eighth Circuit standard, Plaintiffs are estopped from bringing their claims. Accordingly,

IT IS ORDERED that the government's motion for summary judgment is granted and Plaintiffs' claims are dismissed with prejudice.

Dated this 12th day of September, 2000.

BY THE COURT:

Lawrence L. Piersol

Chief Judge

JUDGMENT

In accordance with the Memorandum Opinion and Order dated September 12, 2000 and filed that same day with the Clerk of Court,

IT IS ORDERED, ADJUDGED and DECREED that Plaintiffs' claims are dismissed with prejudice.

Dated this 12th day of September, 2000.

BY THE COURT:

Lawrence L. Piersol

Chief Judge

n1 This letter is attached to Plaintiffs' Statement of Undisputed Material Facts as Exhibit A. In the letter Mr. Kading states that he has attached the letter from Mr. Onken to which he is responding. This attachment was not included in Plaintiffs' Exhibit.

No. 00-3799

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James Ihnen; Lisa Ihnen,
Appellants,

vs.

United States of America,
Appellee.

March 19, 2002, Decided

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 19, 2002

Supreme Court, U.S.
FILED
AUG 14 2002
OFFICE OF THE CLERK

No. 01-1858

In the Supreme Court of the United States

JAMES IHNEN AND LISA IHNEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances of this case, petitioners may recover tax payments that they made under an agreement that compromised the amount claimed due and barred claims for refund of the amounts paid.

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In the Supreme Court of the United States

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JAMES IHNEN AND LISA IHNEN, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 272 F.3d 577. The opinion of the district court (Pet. App. 8a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2001. A petition for rehearing was denied on March 19, 2002 (Pet. App. 17a). The petition for a writ of certiorari was filed on June 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commissioner of Internal Revenue determined that petitioners failed to report income that they received from a restaurant that they owned during the years 1986 through 1991. Following completion of the tax audit, the Commissioner proposed deficiency assessments totaling $200,995 in taxes and $177,207 in fraud and other penalties. Under a settlement reached by the parties in 1995, the Commissioner conceded the fraud penalties and $52,707 in taxes and petitioners agreed to pay the remaining taxes and penalties. To memorialize their agreement, the parties executed a Form 870-AD, Offer To Waive Restrictions On Assessment And Collection Of Tax Deficiency And To Accept Overassessment. The Form 870-AD provided that "[n]o claim for refund or credit will be filed or prosecuted by the taxpayer[s] for the years stated on this form" and that the Commissioner would not reopen the case in the absence of fraud, malfeasance, misrepresentation, concealment, or important mathematical error. Pet. App. 9a-11a.

Petitioners abided by their agreement until September 1998, when they filed claims for refund of the payments they had made under the Form 870-AD. Petitioners asserted at that time that the accounting method used by the IRS in arriving at the assessments proposed for the years covered by the settlement agreement was erroneous. By the time that petitioners made these objections to those determinations, however, the statute of limitations had run against the Commissioner, barring him from assessing and collecting the taxes that he had conceded under the agreement. When the Commissioner denied the claims for

refund, petitioners filed this refund suit in the district court. Pet. App. 10a-12a.

2. The United States moved for summary judgment, arguing that petitioners were barred by the settlement agreement from seeking refunds for the years 1986 through 1991. In *Cain* v. *United States*, 255 F.2d 193 (1958), the Eighth Circuit had held that, even though an informal settlement agreement is not final and conclusive until it is approved by the Secretary of the Treasury or his delegate, such an agreement becomes binding on the parties once the statute of limitations bars the Commissioner from recovering the taxes that he conceded under the agreement. The district court followed *Cain* and granted the government's motion for summary judgment in this case. Pet. App. 8a-16a. The court noted that petitioners' attempt to litigate the merits of the proposed assessments after the government was barred from assessing the full amount of taxes originally asserted was "precisely the injustice sought to be avoided by the theory of estoppel." *Id.* at 14a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court reaffirmed "*Cain*'s clearly enunciated rule" that "it is sufficient to preclude a taxpayer from claiming refund, in relation to an executed settlement agreement, that the statute of limitations has run against the right of the Commissioner to deal with the situation further." *Id.* at 5a (quoting 255 F.2d at 199).

The court of appeals noted that, at oral argument, "in a final effort to avoid the holding of Cain," petitioners sought to waive the statute of limitations as a defense to any counterclaim the government might have made for additional taxes. Pet. App. 5a. The court held that this attempted waiver came "too late" because, "absent exceptional circumstances, this court will not consider

issues first raised on appeal." *Id.* at 6a. The court accordingly declined to rule "on whether a waiver, timely made, would serve to defeat the government's estoppel argument." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Sections 7121 and 7122 of the Internal Revenue Code, a formal administrative settlement of a person's tax liability must be "approved by the Secretary" of the Treasury or his delegate to be "final and conclusive." 26 U.S.C. 7121(b). See 26 U.S.C. 7122(a). To avoid the delays and costs attendant to that formal settlement process, the Commissioner routinely enters into informal settlement agreements—under the Form 870-AD involved in this case—to resolve the bulk of tax cases each year.

At the very outset of the administration of the income tax, the Commissioner took the position that such informal agreements were binding in the same manner as formal settlement agreements. This Court, however, long ago ruled against the Commissioner on that question. In *Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929), the Court held that a settlement agreement is not binding, of its own terms, unless it has been approved by the Secretary under the provisions of what is now 26 U.S.C. 7122. In so ruling, however, the Court expressly left open the question whether an informal settlement agreement of the type made in the present case might, "under some circumstances, [be] binding on the parties by estoppel." 278 U.S. at 289.

b. During the last 73 years, several courts of appeals have addressed the question left open in *Botany Mills*. These courts have uniformly concluded that a taxpayer *is* barred by estoppel from disavowing such an informal settlement agreement when, as in the present case, the taxpayer files a claim for refund *after* the statute of limitations has run to bar the assessment and collection of the taxes that the Commissioner conceded in the informal settlement agreement. *Stair* v. *United States*, 516 F.2d 560, 564-565 (2d Cir. 1975); *Aronsohn* v. *Commissioner*, 988 F.2d 454, 456-457 (3d Cir. 1993); *Daugette* v. *Patterson*, 250 F.2d 753, 756-757 (5th Cir.), cert. denied, 356 U.S. 902 (1958); *Elbo Coals, Inc.* v. *United States*, 763 F.2d 818, 820-821 (6th Cir. 1985); *Cain* v. *United States*, 255 F.2d 193, 198 (8th Cir. 1958); *Guggenheim* v. *United States*, 77 F. Supp. 186, 196 (Ct. Cl. 1948), cert. denied, 335 U.S. 908 (1949). See also *General Split Corp.* v. *United States*, 500 F.2d 998, 1003-1004 (7th Cir. 1974). As the Court of Claims observed in *Guggenheim* v. *United States*, 77 F. Supp. at 196:

> [i]t would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed. A clear case for the application of the doctrine of equitable estoppel exists and should be applied.

In reaching that same conclusion in *Cain* v. *United States*, 255 F.2d at 198, the Eighth Circuit explained that enforcement of an informal settlement agreement by estoppel is not contrary to the statutory provisions for formal settlements (now set forth in Sections 7121 and 7122):

> [N]o conflict or violation of them can be claimed, in allowing the statute of limitations, on general legal ground, to put a seal of finality on a tax settlement * * * which the parties have seen fit to honor in practice by a performance of it; and of which neither has made any repudiation during the period of the running of the statute of limitations against the Government.

These courts have emphasized that, if a material misrepresentation or omission is an element of such an estoppel, that requirement is satisfied by the taxpayer's failure, at the time of the settlement, to state that he might not honor his promise not to file a refund suit. *Stair* v. *United States*, 516 F.2d at 565; *Elbo Coals, Inc.* v. *United States*, 763 F.2d at 821; *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1572 (Fed. Cir. 1988) ("failure to state a position that equity required to be stated promptly if it was not to be deemed abandoned, stands in lieu of any affirmative misrepresentation"). As the court emphasized in *LeFever* v. *Commissioner*, 100 F.3d 778, 787 (10th Cir. 1996), dispensing with proof of more specific misrepresentations to obtain favorable tax treatment in individual cases "fosters better tax administration and reduces unpredictability" that would otherwise result from decisions "attempting to assess relative blame between the taxpayer and the IRS."

c. In the present case, petitioners did not file their claims for refund until after the statute of limitations had run on the Commissioner's ability to assess and collect the taxes that were conceded under the agreement. Pet. App. 5a. The court of appeals thus correctly applied the established case law in holding, in these circumstances, that petitioners were estopped from

seeking a refund in violation of their Form 870-AD settlement agreement. *Id.* at 4a-5a.

2. Petitioners err in claiming (Pet. 8-13) that the decision in this case conflicts with the decision of this Court in *Botany Mills*. Although the government had contended before the Court of Claims in the *Botany Mills* case that the taxpayer was estopped from questioning the informal settlement agreement, that claim was abandoned in this Court because the record did not support it. 278 U.S. at 287-288. The record did not support an estoppel in *Botany Mills* because the applicable statute of limitations on assessment had not run when the taxpayer filed its refund claim in that case. The taxpayer in *Botany Mills* filed its refund claim on February 1, 1922, which was almost a year before the time for assessment expired in January 1923 (as petitioners agree (Pet. 10-11)). The government therefore did not contend in *Botany Mills* that an estoppel existed, and this Court therefore did not consider that issue. Instead, the Court explicitly reserved the question whether an informal settlement agreement of the type made in the present case might, "under some circumstances, [be] binding on the parties by estoppel." 278 U.S. at 289.

3. Petitioners also err in claiming (Pet. 13-15) that the decision in this case conflicts with decisions in other circuits. For example, in relying on *Joyce* v. *Gentsch*, 141 F.2d 891 (6th Cir. 1944), petitioners ignore the subsequent decision of that circuit in *Elbo Coals, Inc.* v. *United States*, 763 F.2d at 820, which noted that the version of the Form 870-AD at issue in *Joyce* "was very different from the one at issue here," because the former version provided that execution of the form would not preclude the Commissioner from asserting a further deficiency. Under the prior version of the

informal settlement agreement that had been involved in *Joyce*, the government "could not have been relying upon an agreement when it failed to assess any deficiencies during the remaining period of the statute of limitations," and there was no detriment to the government as a result of the agreement, "since it was expressly free, if it had found reason, to further assess deficiencies against the taxpayers." *Ibid.* The Sixth Circuit made clear in *Elbo Coals* that when, as here, the Form 870-AD expressly provides that the government will not reopen the case, a "statement by the taxpayer that no refund claim would be filed is misrepresentation of a kind sufficient to ground estoppel once the taxpayer has reneged." *Id.* at 821 (citing *Stair* v. *United States*, 516 F.2d at 565).

Petitioner similarly errs in claiming (Pet. 14-15) that the decision in this case conflicts with *Uinta Livestock Corp.* v. *United States*, 355 F.2d 761 (10th Cir. 1966). In the subsequent decision of the Tenth Circuit in *LeFever* v. *Commissioner*, 100 F.3d at 787, the Tenth Circuit acknowledged that its *Uinta* decision was inconsistent with the earlier decision of that court in *Continental Oil Co.* v. *Jones*, 177 F.2d 508 (1949), cert. denied, 339 U.S. 931 (1950). The court concluded that *Continental Oil* is to be given "precedence over the *Uinta* decision" and expressly rejected the suggestion in *Uinta* that an estoppel must be based on "a showing that the taxpayer made an intentional misrepresentation or a wrongful misleading silence in obtaining favorable tax treatment." *LeFever* v. *Commissioner*, 100 F.3d at 786.

Similarly, in claiming (Pet. 7, 14-15) that cases in the Second Circuit (*Lignos* v. *United States*, 439 F.2d 1365 (1971)), Third Circuit (*Bank of New York* v. *United States*, 170 F.2d 20 (1948)), and Seventh Circuit (*Bennett* v. *United States*, 231 F.2d 465 (1956)) conflict

with the decision below, petitioners ignore later decisions in those same circuits which make clear that no such conflict exits. For example, in *Stair* v. *United States*, 516 F.2d at 564, the Second Circuit held that a taxpayer is estopped to claim a refund when it had executed a Form 870-AD. The court in *Stair* distinguished *Lignos* on the ground that there was no proof in that case that the government had made any concession to the taxpayer as part of the agreement. *Ibid.* Similarly, in *Aronsohn* v. *Commissioner*, 988 F.2d at 456-457, the Third Circuit held that a Form 870-AD settlement was enforceable by estoppel without discussing its earlier decision in *Bank of New York* —perhaps because a note attached to the agreement in *Bank of New York* had expressly reserved the right to file a claim for refund for the tax involved in that case.[1] See 170 F.2d at 23.[2] And, in affirming a district court decision holding a taxpayer bound by estoppel to a Form 870-AD agreement, the Seventh Circuit in *General Split Corp.* v. *United States*, 500 F.2d at 1003, distinguished its prior decision in *Bennet* on the basis that the government had failed to show that the official

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[1] The court emphasized in *Aronsohn* that it agreed "with the general principle that an informal Form 870-AD settlement agreement which includes in its terms an explicit preclusion of refund or credit claims for the years covered under the settlement may equitably bind the taxpayer by estoppel from bringing a subsequent refund action." 988 F.2d at 456.

[2] Petitioners err in claiming that, under the settlement agreement involved in this case, they "contemporaneously reserved in writing the right to seek a refund." Pet. 9. The letter on which they rely for this claim was sent by their attorney to the IRS before the date the Form 870-AD was executed, and it states only that the settlement he was proposing in "no way prevents or precludes my clients for making an offer in compromise." Pet. 5-6.

who had executed the Form 870-AD on behalf of the Commissioner in that case was authorized to do so. See also *id.* at 1003 n.9.

Finally, petitioners err in claiming (Pet. 15) that the decision in this case conflicts with *Whitney* v. *United States*, 826 F.2d 896 (9th Cir. 1987). The decision in that case rested on whether the Form 870-AD executed by Whitney was part of a package settlement that included the Commissioner's concessions—not to Whitney to whom the government had conceded nothing—but to Whitney's partner. Whitney and his partner had each claimed a deduction for the same partnership expense on their individual returns. In his Form 870-AD, Whitney conceded the deduction and paid the corresponding deficiency. 826 F.2d at 898. Under a separate Form 870-AD, the Commissioner allowed the deduction to Whitney's partner. Asserting that the two forms reflected a package settlement, the government contended that its reliance on Whitney's Form 870-AD in permitting the time to assess a deficiency against his partner to expire should estop Whitney from claiming a refund. The Ninth Circuit remanded the case because it was unable to determine on the record before it whether the parties intended to enter into a package deal and remanded the case to the district court for factual findings on that issue. *Ibid.* The court indicated, in doing so, that the doctrine of estoppel would apply if such a package settlement had been made. *Ibid.* There is no conflict between the *Whitney* decision and the decision in the present case, for the record clearly reflects that the government "waived fraud penalties and conceded a reduction of $52,707 in taxes" in entering into the Form 870-AD agreement in this case. Pet. App. 3a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1858

In the

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JAMES IHNEN AND LISA IHNEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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REPLY ARGUMENT

The United States' attempt to distinguish *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) from the case at bar is clearly without merit. That the applicable statute of limitations on assessments by the United States had not yet run when Botany made its claim for refund to the IRS has no bearing on the estoppel analysis; the salient issue is that the statute of limitations had indeed expired before Botany filed its Petition in the United States Court of Claims for recovery of the taxes in dispute. *See Botany Worsted Mills v. United States*, 63 Ct.Cl. 405 (1927), aff'd 278 U.S. 282, 286-87 (1929). The Court of Claims denied the petition on the ground that it would be inequitable for Botany to recover under its Petition while "hold[ing] to the advantage derived from the settlement." *Id.* 278 U.S. at 287. Clearly it is the timing of the commencement of the legal action for recovery of taxes, *vis a vis* the Government's statute of limitations to assess additional taxes and counterclaim therefor, which is salient to the estoppel argument. The date of the administrative claim for refund is of no relevance.

In *Botany*, before this Court, on certiorari to the Court of Claims, the Solicitor General essentially abandoned the case, offering no argument, admitting that the settlement agreement was not binding, and conceding that "[n]o ground for the United States to claim estoppel is disclosed in the findings." *Id.* at 287-88. "Independently of these concessions," this Court found that the informal settlement agreement was not binding and that "the findings disclose no adequate ground for any claim of estoppel by the United States." *Id.* at 288-89. Accordingly, while this Court did reserve the question of whether an informal settlement agreement may be binding under "some circumstances," those circumstances would as a matter of law have to be in some *material* way distinguishable from those presented in the *Botany* case. The United States has failed to articulate any rationale to support the supposition that the timing of the administrative claim for refund is a material distinction. That argument was never

raised at either the District or Circuit Court level. The timing of the administrative claim is a meaningless red herring.

Indeed, in *Cain v. United States*, 255 F.2d 193 (8th Cir. 1958), upon which the District Court and the Circuit Court below relied in granting and affirming summary judgment herein, the taxpayer Cain filed a claim for refund with the Commissioner of Revenue two years before the IRS's statute of limitations to assess additional taxes expired, and then brought his action in District Court after the statute of limitations expired. *Id.* at 194, 195. That scenario is similar to the one which occurred in *Botany*. In flat contradiction to the *Botany* decision, the *Cain* court held that estoppel must lie. Per *Cain*, the estoppel issue arises when the statute of limitations against further IRS assessments runs. *Id.* at 199. By definition, a statute of limitations is an affirmative defense in a lawsuit, nothing more. FRCP 8(c); *United States v. Gurley*, 415 F.2d 144, 147 (5th Cir. 1969); *Badway v. United States*, 367 F.2d 22, 25 (1st Cir. 1966); *United Business Corp. of America v. Commissioner*, 19 BTA 809, 831 (United States Board of Tax Appeals 1930). Clearly, the date of the administrative claim for refund has no relevance to the statute of limitations or the estoppel analysis. Just as clearly, the *Cain* decision and the Eighth Circuit's decision below are irreconcilable with this Court's clear mandate in *Botany Mills*.

The United States also contends that there is no conflict among the circuits with respect to this issue. However, scrutiny of the cases reveals only that there are conflicts *within* certain circuits, as well as among the various circuits. For example, the Sixth Circuit correctly ruled for the taxpayer on the estoppel issue in *Joyce v. Gentsch*, 141 F.2d 891 (6th Cir. 1944), but incorrectly applied estoppel in *Elbo Coals, Inc. v. United States*, 763 F.2d 818 (6th Cir. 1985). The Tenth Circuit decision in *LeFever v. Commissioner*, 100 F.3d 778 (10th Cir. 1996) did not involve a closing agreement but instead involved the "duty of consistency" where taxpayers valued certain land under the

special use valuation election, 26 U.S.C. § 2032A, in early years and, after the statute of limitations expired on the IRS to re-assess, recharacterized the land in a blatant attempt at tax gamesmanship. *Id.* at 781. This was a different issue than that raised in *Uinta Livestock Corp. v United States*, 355 F.2d 761 (10th Cir. 1966), which involved the precise issue in the case at bar; i.e., whether execution of an informal closing agreement gives rise to an estoppel in a refund case after the government's statute of limitations to assess additional taxes has lapsed. *Id.* at 767. Nor was *Continental Oil Co. v. Jones*, 177 F.2d 508 (10th Cir. 1949) a closing agreement case. Further, the Tenth Circuit, after the *LeFever* case, cited *Uinta* as good law in *Benson v. United States*, 120 F.3d 270 (Table, text in Westlaw)(10th Cir. 1997).

In the Second Circuit, summary judgment was reversed on the estoppel issue where, as in the case at bar, there were disputed issues of material fact. *Lignos v. United States*, 439 F.2d 1365, 1368-69 (2nd Cir. 1971). Summary judgment was granted four years later in *Stair v. United States*, 516 F.2d 560 (2nd Cir. 1975) because the facts were stipulated and only issues of law remained. *Id.* at 561, 564. In *Stair*, *Lignos* was cited as controlling authority and the division among the circuits was noted. *Id.* at 563-64.

Similarly, in the Third Circuit, summary judgment was denied on the basis of disputed material facts relating to misrepresentation and detrimental reliance in *Bank of New York v. United States*, 170 F.2d 20, 24 (3rd Cir. 1948). Forty-five years later, summary judgment was granted in favor of the government in *Aronsohn v. Commissioner*, 988 F.2d 454 (3rd Cir. 1993) on the basis of different, undisputed facts. *Id.* at 455. *Bank of New York* was neither expressly or impliedly overruled by *Aronsohn*.

In the Seventh Circuit, the decisions in *Bennett v. United States*, 231 F.2d 465 (7th Cir. 1956) and *General Split Corp. v. United States*, 500 F.2d 998 (7th Cir. 1974) are entirely consistent and support Petitioner herein. In *Bennett*

judgment on the pleadings in favor of the government was reversed and the matter was remanded for plenary trial because the informal closing agreement was not binding, even though the taxpayer filed both its claim for refund and lawsuit after the statute of limitations had expired for the assessment of additional taxes. *Id.* at 468. Summary judgment was granted in favor of the government in the subsequent case, *General Split*, on different, unique facts involving an integrated agreement involving a "package settlement" which precluded any "equitable way to undo the portion of the settlement reflected in the Form 870-AD." *Id.* at 1003-04. The *General Split* Court noted that "[t]he cases are by no means consistent" and cited *Bennett* as controlling authority. *Id.* at 1002-03.

Contrary to the United States interpretation, the Ninth Circuit's decision in *Whitney v. United States*, 826 F.2d 896 (9th Cir. 1987) clearly teaches that summary judgment should not be granted on the basis of estoppel predicated upon an informal settlement agreement unless there is no dispute as to the material facts relating to any of the traditional grounds for that affirmative defense. *Id.* at 898 n.5. The *Whitney* Court, like the others, noted that the Circuit Courts "have taken divergent views" on this issue. *Id.* at 897. That divergence does exist. The Second, Third, Seventh and Ninth Circuits agree with Petitioners' interpretation herein and are consistent with this Court's ruling in *Botany Mills* that expiration of the statute of limitations, standing alone, does not mandate estoppel. The Fifth Circuit is in accord with the Eighth Circuit decision below, holding that estoppel must lie after the statute of limitations runs. The Sixth Circuit appears to have shifted from following *Botany* to following the Eighth Circuit's *Cain* decision. The Tenth Circuit's position is internally inconsistent with *LeFever*, although facing a different issue, suggesting that *Uinta* was wrongly decided, but with *Benson* subsequently noting *Uinta* as controlling authority. This Court should grant certiorari in order to resolve this divergence.

CONCLUSION

The Petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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